

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PACIFIC OPERATORS, OFFSHORE, :

4 LLP ET AL., : No. 10-507

5 Petitioners :

6 v. :

7 LUISA L. VALLADOLID, ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, October 11, 2011

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:02 a.m.

15 APPEARANCES:

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17 Petitioners.

18 JOSEPH R. PALMORE, ESQ., Assistant to the Solicitor
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20 behalf of Federal Respondent.

21 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
22 Private Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-507, Pacific Operators
5 Offshore v. Valladolid.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS

9 MR. CLEMENT: Mr. Chief Justice, and may it
10 please the Court:

11 The straightforward question in this case is
12 whether the Outer Continental Shelf Lands Act provides a
13 remedy for a worker injured in a forklift mishap on dry
14 land. The answer is no. A worker injured on dry land
15 from operations on dry land has a remedy in the State
16 workers' compensation law, but not from OCSLA's
17 extension of the Longshore Act to the outer continental
18 shelf. Indeed, both the benefits review board and the
19 Ninth Circuit here held that the accident occurred too
20 far inland for direct coverage under the Longshore Act.

21 CHIEF JUSTICE ROBERTS: When you say on
22 land, do you -- where do you put the 3-mile State
23 offshore limit? Does that count as land under your
24 view?

25 MR. CLEMENT: No, it wouldn't count as land,

1 Mr. Chief Justice. If there were platforms on there
2 that were themselves treated as land, that might be. I
3 think most of the 3 miles from shore is going to be the
4 navigable waters and that might be covered, for example,
5 directly under the Longshore Act. But as I say, one of
6 the anomalies here is there was a direct Longshore Act
7 involvement in this case, and the determination was that
8 the facility here was too far inland for direct coverage
9 under the Longshore Act.

10 So therefore, the counterintuitive
11 proposition on the other side of the table today is that
12 in extending the Longshore Act to the outer continental
13 shelf, Congress effectively created a boomerang effect
14 that caused the Longshore Act to apply further inland
15 than it otherwise would.

16 JUSTICE KAGAN: Mr. Clement, just to follow
17 up on the Chief Justice's question, if there is a
18 helicopter crash in the water, let's say it occurs 2.5
19 miles from the shore, is that covered? And similarly
20 would it be covered if it occurred 3.5 miles from the
21 shore?

22 MR. CLEMENT: Well, Justice Kagan, I think
23 the best answer is both of those crashes would be
24 covered directly by the Longshore Act because the
25 Longshore Act by its own terms, not extended by OCSLA,

1 covers the navigable waters, and both of those would be
2 accidents occurring in the navigable waters. And in the
3 part of this Court's opinion in the Pacific Operators
4 case addressing the DOSA claim, this Court said that a
5 helicopter effectively when it's performing this kind of
6 ferrying function is a vessel. So I would think that
7 the right answer there is not that OCSLA extends the
8 Longshore Act, but the Longshore Act applies directly
9 under those circumstances.

10 JUSTICE ALITO: The curious thing about this
11 case is that the statutory language seems to me to speak
12 quite clearly to some theory of causation. Any injury
13 occurring as a result of operations conducted on the
14 outer continental shelf, that's -- that's causation.
15 Maybe it's but-for, maybe it's proximate, but it's some
16 -- some species of causation. And yet nobody wants this
17 really to be -- neither you nor your adversary nor the
18 government wants this to be a -- to be based on
19 causation. Everyone wants to smuggle something else
20 into -- into here -- into this.

21 MR. CLEMENT: Well, Justice Alito, let me
22 talk first about the causation and then about the
23 smuggling if I can. As to the causation, I think there
24 is both causation in this 1333(b) and a situs
25 requirement that both sides acknowledge. At a bare

1 minimum, there has to be injuries resulting from
2 operations conducted on the shelf. And I think that
3 alone, that causation principle alone, if faithfully
4 applied, is enough to decide this case in our favor.
5 But let me address the smuggling, because I do think --

6 JUSTICE SCALIA: Give -- give me an example
7 of a -- of an injury that occurs on the shelf that is
8 not a consequence of operations conducted. What -- just
9 beachcombers out there, or what?

10 MR. CLEMENT: Well, I think the best example
11 would be, Your Honor, is somebody who's on the shelf but
12 they are not employed in the relevant production
13 purposes. And so you might have --

14 JUSTICE SCALIA: What are they doing out
15 there?

16 MR. CLEMENT: Well, you might have an
17 accountant out there. You might just have some
18 employees who are out there whale watching or something.

19 JUSTICE GINSBURG: How many accountants go
20 to platforms?

21 MR. CLEMENT: Well, Justice Ginsburg, I
22 think it's worth recognizing -- I mean, I don't know how
23 many go. I doubt very many go. But Congress passed
24 this statute at a time where they didn't know the full
25 scope of the operations that would take place out on the

1 shelf. And so what they are trying to do is they are
2 trying to -- at the one point they are trying to limit
3 it to employees who are engaged in the operations out
4 there that are designed for the production of the
5 mineral wealth of the shelf. And so I think that's what
6 some of the language is directed at --

7 JUSTICE GINSBURG: But if that -- if that's
8 what Congress meant, then the emphasis should be on is
9 this person one who regularly works on the outer
10 continental shelf. The -- this worker we're told was on
11 the outer continental shelf 98 percent of the time.

12 MR. CLEMENT: Sure. And if he was at the --
13 on the Outer Continental Shelf at the time of this
14 accident, he probably wouldn't have been injured.

15 But the one thing I think the statute
16 clearly speaks to is not status, but it speaks to, as
17 Justice Alito suggested, at a minimum a relationship
18 between the operations that caused the injury and the
19 fact that those operations have to be conducted on the
20 shelf.

21 JUSTICE SOTOMAYOR: But Mr. --

22 JUSTICE KENNEDY: But -- but if you had said
23 status or situs, then it seems to me it would have made
24 more sense, given the language of the statute. We all
25 have hypotheticals. We have too many, but it -- it's

1 quite common on oil rigs that the employees bring some
2 of the equipment back to the land, clean it, prepare it,
3 and so that they can bring it back to the next -- the
4 next shift on the rig. And some of this machinery is
5 complicated. It has springs in it. And suppose that
6 the worker brings the machine back from the rig to the
7 land, to the base of operations that is land-based, and
8 is injured in repairing that machine? Under your view
9 no coverage?

10 MR. CLEMENT: No coverage, Your Honor, and I
11 think that's --

12 JUSTICE KENNEDY: I think that's quite
13 difficult to square with the "as a result" language,
14 because this is a result of the operation. Let's just
15 say the machine got broken because of the -- of the
16 operations, and there -- and he's fixing it and he's
17 injured.

18 MR. CLEMENT: No, I disagree, Your Honor,
19 respectfully, and I think your way of looking at that
20 hypothetical doesn't give sufficient import to the
21 phrase "conducted on the shelf." It's -- what
22 Respondents want to do is they want you to look at the
23 statute as saying as long as there is an injury that
24 results from operations that have the purpose of
25 developing the outer continental shelf, that that's

1 enough. And if that were enough I think the answer to
2 your hypothetical would be that's covered.

3 But the statute very specifically says that
4 they have to be injuries as a result of operations
5 conducted on the shelf for the purpose of extracting the
6 mineral wealth of the shelf.

7 And so that first "on the shelf" I think
8 clearly modifies the operations. Only operations
9 conducted on the shelf are covered by the statute.

10 JUSTICE KENNEDY: Well the government -- the
11 government and the Ninth Circuit take care of that by
12 saying that the person has to have -- the injured
13 employee has to have spent substantial amount of time on
14 the -- on the offshore operations, so you could add
15 that.

16 MR. CLEMENT: Well, you can't add that, Your
17 Honor, because if there's one thing that is absolutely
18 clear about this statute it's that it doesn't include a
19 status test that looks for the predominant place you
20 spend your time. And that's not --

21 JUSTICE GINSBURG: I thought your brief,
22 your reply brief, said you -- you superimpose a status
23 test. You have the situs of the injury and then you
24 superimpose status. So your test is not simple state
25 of -- place of injury.

1 JUSTICE KENNEDY: I agree. I thought you
2 had a back-up argument --

3 MR. CLEMENT: Well --

4 JUSTICE KENNEDY: -- in your -- in your
5 reply brief.

6 MR. CLEMENT: Sure. I mean, I have two
7 arguments and let me try to address both, which is to
8 say, on the causation point, if you look at just
9 causation and you don't have a site and a status
10 requirement, then in that scenario there is no way to
11 get just the status test. And the only thing I would
12 implore you to think about in that is, not only is it
13 not in the statute, but there is a statute that has a
14 status-based remedy that travels with the worker
15 wherever they go. It's the Jones Act and it
16 specifically is written in status terms. And that was a
17 model that Congress had before it, but it specifically
18 rejected the admiralty model for dealing with these
19 structures and adopted the model that has them treated
20 as land --

21 JUSTICE KENNEDY: Would you call status --
22 if the test is where you spend a substantial amount of
23 time working, is that what you call status?

24 MR. CLEMENT: That's their status test,
25 exactly.

1 JUSTICE KENNEDY: You -- but you call that
2 status?

3 MR. CLEMENT: I call that their pure status
4 test, which they themselves cite to Chandris, which is a
5 Jones Act case. That just doesn't work. This was not
6 the Jones Act.

7 Now, there is a test where we say that the
8 best reading of the statute is status plus situs. And
9 if I try to get this argument out, it's a little bit
10 complicated, because I think the defect of this
11 argument, if it has one, is it doesn't directly leap out
12 directly from 1333(b) you have to read 1333(b) in
13 conjunction with both the rest of 1333 and in
14 conjunction with 903(a) of the Longshoreworkers' Act.

15 If you do that, I think you will see there
16 is a situs requirement and a status requirement. Let me
17 start with the rest of the 1333. If you think about the
18 statute, the primary engine for applying Federal law to
19 the shelf is not 1333(b), it's 1333(a). It applies all
20 the Federal law to the shelf.

21 But some statutes, it doesn't work and the
22 longshore Act is one of them. If you apply the
23 Longshore Act to the shelf without any modifications, it
24 won't cover the shelf because it by its terms has a
25 situs requirement that is limited to the navigable

1 waters and at that point the drydocks. So Congress has
2 to tailor the Longshore remedy to the reality of the
3 shelf and it does it in two ways.

4 One, it has this language that everyone's
5 focused on that is something of a status requirement in
6 that it limits the recovery to employees who are engaged
7 in certain activities, but the rest of the language in
8 1333(b) is important. It's these definitions 1, 2, and
9 3, and they effectively define terms in the Longshore
10 Act to make them work for purposes of extending it to
11 the shelf.

12 And the key definition is 3. 3 defines the
13 term "United States" when used in the geographical
14 sense, and it defines it to include the shelf, the
15 artificial islands, and the fixed attachments thereto.
16 Now, that's a puzzle if you look at 1333(b) in
17 isolation, because it's defining the term "United
18 States" for geographical purposes and 1333(b) does not
19 use the term "United States" for geographical purposes.
20 But another statute does; it's 903. It's the Longshore
21 remedy that's extended.

22 And 903(a) uses the term "United States."
23 And 903(a) if you want to look at it is at page 96 of
24 the petition appendix. But that's the situs
25 requirement. The the situs requirement of 903(a)

1 unmodified limits recovery to the navigable waters and
2 drydocks. So if you take that definition from (b)(3)
3 and essentially superimpose it on 903(a), you then get a
4 remedy that has a situs requirement; there's a recovery,
5 but only if the injury occurs on the navigable waters,
6 drydocks, the shelf, artificial islands, and the
7 attachments there to.

8 So it's -- as I say, it's a complicated
9 argument and it doesn't stare you in the face if you
10 look at 1333(b) --

11 JUSTICE SOTOMAYOR: Sorry. How does that --
12 how does that provide you situs on the adjacent waters.

13 MR. CLEMENT: I don't -- with respect,
14 Justice Sotomayor, I think you get that without OCSLA,
15 which is to say I think that there is a remedy under the
16 Longshore Act directly under the adjacent waters because
17 the adjacent waters are navigable waters.

18 JUSTICE SOTOMAYOR: I see, so you are saying
19 you don't even -- you're not going --

20 MR. CLEMENT: You don't need those, and that
21 just underscores that Congress in the statute is really
22 dealing with a very particular problem with the shelf
23 and the artificial islands and platforms attached to
24 them.

25 JUSTICE SOTOMAYOR: How do you get to the

1 water above the shelf?

2 MR. CLEMENT: Same way, Your Honor, which is
3 saying they are navigable waters.

4 JUSTICE SOTOMAYOR: Instead of saying they
5 are part of the shelf?

6 MR. CLEMENT: Exactly, and they're not. The
7 statute I think couldn't be clearer about that because
8 1332 --

9 JUSTICE SOTOMAYOR: I think the issue that
10 Justice Kennedy was alluding to was the example the
11 Ninth Circuit used: A pitcher on the mound throws a
12 baseball and hits the batter. The situs is not the
13 mound, but the injury has occurred as a result of
14 pitching, and so he's coming up with examples and I
15 think that's what the Ninth Circuit was saying when it
16 was creating the test of the substantial nexus between
17 the operation and the injury.

18 MR. CLEMENT: I'm --

19 JUSTICE SOTOMAYOR: And that's the part of
20 your -- of your definition that gives no credence to
21 that possibility.

22 MR. CLEMENT: Well --

23 JUSTICE SOTOMAYOR: You may be arguing that
24 as a factual matter what this man was doing on land was
25 not a substantial nexus. That's a different issue than

1 providing a test that limits injury to an operation
2 solely on the shelf.

3 MR. CLEMENT: And if I could take that,
4 there's a couple of pieces to that, Justice Sotomayor.
5 First of all, I would say that I think that the
6 hypothetical, let's say, of a nut or something coming
7 off the shelf and hitting somebody somewhere else is --
8 illustrates the difference between our primary argument
9 and our back-up argument. On a primary, somebody 00 if
10 the nut hits somebody in the navigable waters, they
11 wouldn't recover from OCSLA; they would recover under
12 the Longshore Act directly because they were on the
13 navigable waters.

14 On our back-up theory, that is a tight
15 proximate cause test, then I would say, yes, that person
16 can recover under OCSLA, but that is really a fortuitous
17 set of circumstances precisely because I wouldn't apply
18 a substantial nexus test, which seems to me just an
19 invitation to kind of play around with -

20 JUSTICE SOTOMAYOR: Well, you're not -- you
21 don't want a but-for test.

22 MR. CLEMENT: Certainly not.

23 JUSTICE SOTOMAYOR: All right. You don't
24 want a proximate cause test.

25 MR. CLEMENT: I could live with a proximate

1 cause test as long as it is a proximate cause test that
2 is tailored to the statute. And what I mean by that is
3 I think if you look at the statute you can't have a
4 proximate cause test that doesn't take geography into
5 account.

6 And I think in particular, I think in a case
7 like this you have to ask yourself not just proximate
8 cause in the abstract, but were there operations
9 somewhere other than the shelf that were a more direct
10 proximate cause of the injury? If that's the case, then
11 the remedy lies in the law that applies to those other
12 operations.

13 JUSTICE SOTOMAYOR: Does this meet your
14 definition of causation now?

15 MR. CLEMENT: What's that?

16 JUSTICE SOTOMAYOR: This is a new version of
17 proximate cause.

18 MR. CLEMENT: Well, you know, it's funny
19 because this Court has on more than one occasion sort of
20 remarked that "proximate cause" itself is a weird
21 formulation because "proximate" sounds like it has a
22 location aspect to it. And we actually think for
23 purposes of this statute that should be right. It's
24 proximate cause as tailored to this statute and the
25 policies of this statute and I think that would want to

1 really take the geography into account.

2 JUSTICE SCALIA: Mr. Clement, I don't really
3 understand proximate cause as applied to a -- a statute
4 that provides for automatic liability rather than
5 liability for negligence. To say that it's a proximate
6 cause of a particular act of negligence is one thing and
7 we have a whole body of law that gives guidance for
8 that. But do you know of any other situation where we
9 talk of proximate cause, something proximately caused by
10 operations? Not by a particular act of negligence or --
11 I don't know how to apply proximate cause to an
12 operation.

13 MR. CLEMENT: Well, Justice Scalia, I would
14 say two things. One is I do think there is anomaly
15 here, but I do think you are not being asked to apply
16 proximate cause for purposes of assessing liability
17 because, as you say, strict liability is kind of
18 automatic liability.

19 But what I would say is you are being asked,
20 at least under the back-up theory, to apply proximate
21 cause as a way of determining the geographical scope of
22 the statute. And that's anomalous, but I don't think
23 it's so anomalous that you wouldn't do it if you thought
24 that was the better way to read the statute.

25 That said, I do think that the best way to

1 read the statute is consistent with the all the other
2 statutes as part of a jurisdictional puzzle. All of the
3 areas off of the shelf are governed, with the exception
4 of seamen under the Jones Act, primarily as a matter of
5 geography. So --

6 JUSTICE GINSBURG: Mr. Clement, if your
7 position is right then we have a worker who most of the
8 time is doing work on a platform and he will be covered
9 or not depending on whether the injury occurred on the
10 shelf or on the land. So it's -- the other view is to
11 say, what this person does most of the time is what
12 counts. Then this worker would always be covered by
13 OCSLA and if you take your view, then one will be
14 covered by OCSLA, and another one who is doing the same
15 job is covered by a State -- a State -- you have a
16 variety of State workers' compensation laws as opposed
17 to a uniform law governing workers of this kind.

18 MR. CLEMENT: Well, two responses, Justice
19 Ginsburg. First of all, this Court has already
20 confronted the objection that, well, if under OCSLA
21 workers would move in and out of coverage and it
22 rejected it in the Herb's Welding case. And I don't --
23 I think it's common ground -- well, maybe not, but it
24 should be common ground that if you had a worker who was
25 injured on a State platform, that that would not be

1 covered by -- a State waters platform, that that would
2 not be covered by OCSLA.

3 And again, that was an anomaly that this
4 Court confronted in Herb's welding and the Court said:
5 Yes, well, workers are going to move in and out of
6 coverage, but that's what OCSLA says.

7 JUSTICE KENNEDY: That brings me -- I am
8 looking at petition appendix 96 -- 903(a) that you
9 referred us to. I wasn't quite sure of your argument
10 with respect to this statute. This statute is a
11 situs-based statute.

12 MR. CLEMENT: Yes, and it's the Longshore
13 Act.

14 JUSTICE KENNEDY: But since Congress didn't
15 follow this model in the -- in subsection (b) that we
16 are looking for and used "as a result," why doesn't that
17 show that Congress meant something different? I didn't
18 hear your argument on that point.

19 MR. CLEMENT: Well, my argument --

20 JUSTICE KENNEDY: I don't see, in other
21 words, how 903 doesn't hurt you more than it helps you.

22 MR. CLEMENT: It helps me because 1333(b)
23 doesn't apply a different model. It adopts this model.
24 It adopts and extends the Longshoreman Act to the shelf.
25 See, it's a mistake to read 1333 --

1 JUSTICE KENNEDY: But it doesn't; it talks
2 about where the injury occurs, and that's not what --
3 and that's not what (b) says.

4 MR. CLEMENT: No, it talks about that as
5 part of extending the Longshore Workers' Act to the
6 shelf. It's important that, you know, you can't get --
7 I mean, 1333(b), like I said, is not a self-contained
8 offshore workers workers' compensation regime. What it
9 does is it extends the Longshore Workers' Act to the
10 shelf, including 903(a).

11 But what I'm saying is Congress recognized
12 that you couldn't just extend 903(a) and the rest of the
13 Act to the shelf without modification, because then you
14 come to this language that says you only get relief if
15 your injury occurred on the navigable waters or the
16 drydocks attached thereto. So Congress in (b)(3)
17 changes the definition of the United States for
18 geographical purposes in a way that allows you to
19 superimpose this provision to the shelf, but instead of
20 reading it to say you only get a recovery if you are
21 injured on the navigable waters including the drydocks,
22 you get a recovery if you're injured on the navigable
23 waters, including the shelf, the drydocks, the
24 artificial islands and the fixtures attached thereto.

25 JUSTICE GINSBURG: Mr. Clement, may I go

1 back to -- you referred to Herb's Welding, but that was
2 a case -- it was a claim under the Longshore Act, not an
3 OCSLA claim, and the Court said it was expressing no
4 opinion on whether 1332(b) covered the injury.

5 MR. CLEMENT: That's right. Herb's Welding
6 is not a holding, but at the end of that opinion the
7 Court confronts this argument that, isn't it odd that
8 somebody would be moving in and out of coverage, and the
9 Court says that that is a product of OCSLA. And it
10 doesn't say it's a product of OCSLA generally; it says
11 particularly that it's a product of OCSLA's extension of
12 the Longshore Act.

13 And I do think that this objection about
14 people moving in and out was answered by the Court in
15 Herb's Welding. I would also say, Justice Ginsburg, the
16 second point I wanted to make in response to your
17 earlier question is, I understand that it might make
18 policy sense to have coverage that encapsulates an
19 individual no matter where they work. But the problem
20 is that's not only a different model, that's the model
21 that Congress rejected. They thought long and hard
22 about having an admiralty remedy, and presumably then
23 the Jones Act would apply, and if you were attached to a
24 vessel or a platform then you would have coverage no
25 matter where you went.

1 But that's not what they did. They
2 incorporated instead as their model the Longshore Act,
3 and the Longshore Act always had a situs requirement.
4 So when Congress makes a conscious effort to deal with
5 this unusual geographical problem with -- and solves the
6 problem with the Longshore Act, which is sitting there
7 with a situs requirement, and doesn't adopt the Jones
8 Act, which has a status-only requirement, it seems very,
9 very, peculiar to adopt instead a model that would have
10 a status-only test. -

11 JUSTICE GINSBURG: But Congress also did not
12 adopt the proposal, the specific proposal to confine
13 OCSLA to situations in which State workers' compensation
14 was unavailable.

15 MR. CLEMENT: And I think that's -- they
16 rejected that with good reason, Your Honor, because you
17 have to remember that at this point they are living with
18 the experience that this Court ultimately resolved. But
19 they are living in real-time with the experience of
20 people under the Longshore Act, which at that point did
21 carve out and limit the remedy, the federal remedy, only
22 when a State remedy was unavailable. And they were
23 watching that play out and it was a mess. People didn't
24 know if they should bring a State case or a Federal
25 case, and at that point they were viewed as exclusive.

1 So Congress had ample reasons to reject the idea that
2 we're going to only give a Federal remedy if a State
3 remedy is unavailable.

4 JUSTICE SCALIA: What reason did they have
5 to use the -- the terminology "as a result of" instead
6 of simply saying that this act applies only with regard
7 to injuries on the platform, which is what other
8 statutes did say? I mean, other statutes had a
9 geographical requirement. What a strange way to say it,
10 "as a result of operations."

11 MR. CLEMENT: Justice Scalia, I don't know
12 which other statutes you are talking about. I mean, the
13 other statute that most plainly has a situs argument is
14 the Longshore Act, and that is precisely what they
15 extended to the shelf, as I've argued. Beyond that,
16 it's true that some of the other provisions of this Act
17 have slightly different wording, but I don't think
18 anything turns on that --

19 JUSTICE KAGAN: But, Mr. Clement, you are
20 asking us to just ignore six words in this statute,
21 right? You read the statute as any injury occurring on
22 the outer continental shelf, when in fact the statute
23 says "any injury occurring as a result of operations
24 conducted on the outer continental shelf," and you give
25 a variety of arguments in your brief about what those

1 six words are supposed to do. They are supposed to
2 cover latent injuries, they are supposed to make sure
3 that the statute only covers things that happen in the
4 scope of your employment.

5 But your friends come back and say the
6 statute did all those things anyway; these six words
7 would serve no function under your theory.

8 MR. CLEMENT: Justice Kagan, first of all,
9 it's interesting. The only way they can say that those
10 functions were performed by the statute anyways is to
11 incorporate provisions of the Longshore Act, because
12 1333(b) itself doesn't take care of latent injuries, or
13 doesn't take care of, you know, who is in the scope of
14 their employment. All of that is taken care of in the
15 Longshore Act, which is why I think the best way to read
16 this is incorporating the Longshore Act and its situs
17 requirement.

18 But beyond that, I would never ask you to
19 make six words go away, never. Those words do play a
20 function, but the function they play is to make it clear
21 that the injury has to result of operations conducted on
22 the shelf for certain purposes. And that precludes an
23 employee accountant who is out on the shelf and injured
24 by something that has nothing to do with shelf
25 operations.

1 JUSTICE KAGAN: This goes back to Justice
2 Ginsburg's question. She asked you how many accountants
3 are there on the shelf? One can't really imagine that
4 Congress is writing this, this statute, and drafting
5 those six words in order to make sure that an accountant
6 who goes out to the outer continental shelf isn't
7 covered.

8 MR. CLEMENT: Justice Kagan, I would beg to
9 differ. And I think what you have to understand is, go
10 back in 1953 and when they -- I mean, you can say
11 confidently that there aren't accountants on the shelf
12 because you have the benefit of 60 -- 60 years of
13 experience with -- post-1953 with what goes on, on the
14 shelf. Congress at this point is sort of legislating
15 for a brave new world, and they don't -- they are trying
16 to provide for all of the occasions that may come to
17 pass out on the shelf.

18 There is a great law review article that
19 actually provides this background, and it's written by,
20 of all people, Warren Christopher, the Warren
21 Christopher, and it's in the Stanford Law Review, and it
22 was written in December of 1953, and it's worth a look
23 because it captures this idea that they are kind of, you
24 know, legislating for this brave new world out there and
25 they don't know who is going to be out there. They

1 don't know if it is going to be all drill workers or if
2 there is going to be accountants and clerical workers
3 out there.

4 And so I think with that context, it's not
5 at all odd that they would use those six words to say,
6 kind of the way that Congress did later in 1972 in
7 imposing the marine employment test for longshoremen,
8 it's like, look, we want to provide a longshore remedy,
9 but not to just anybody, any employee who might happen
10 to be on the shelf; we want to provide it to those
11 people who are essentially in the core operations that
12 are going on, on the shelf.

13 If I could reserve the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Clement.

16 Mr. Palmore.

17 ORAL ARGUMENT OF JOSEPH R. PALMORE
18 ON BEHALF OF THE FEDERAL RESPONDENT

19 MR. PALMORE: Thank you, Mr. Chief Justice,
20 and may it please the Court:

21 I would like to start off with the exchange
22 that Justice Kagan had with Mr. Clement about the
23 language that was used here in 1333(b), and I think the
24 contrast between the language that Congress used in
25 1333(b) and the language it used in other provisions,

1 neighboring provisions of 1333, is instructive.

2 And I would like the point the Court to
3 section 1333(c), which is on page 3(a) of the appendix
4 to the government's brief. This is the provision
5 involving the National Labor Relations Act. And I think
6 this shows how Congress went about drafting when it
7 wanted to specify legal consequences that would flow
8 from an actual event that took place in a particular
9 place. So Congress extends the National Labor Relations
10 Act to any unfair labor practice as defined in such act
11 occurring upon any artificial island. And it lists with
12 particularity the particular situses where the National
13 Labor Relations Act would apply.

14 If Congress had followed that model in
15 section 1333(b) it would be a very different statute.
16 It would have said, as Your Honor pointed out, with
17 respect to disability or death of an employee resulting
18 from any injury on the outer continental shelf. If
19 Congress wanted to additionally require -- have some
20 kind of operations nexus, it could have said occurring
21 on the outer continental shelf as the result of
22 operations on the outer continental shelf.

23 Congress didn't do either of those things in
24 section 1333(b), and we think that contrast is -- is
25 quite instructive here. It's also not the case --

1 JUSTICE KAGAN: Mr. Palmore --

2 CHIEF JUSTICE ROBERTS: Well, but it's a
3 little -- it's a little different when you are talking
4 about a labor practice and an activity that results in
5 an injury. Labor practice by its terms is going to have
6 applicability to a particular location. So you would
7 expect them to use that type of language. It doesn't
8 carry the same negative implication you are suggesting
9 under 1333(b).

10 MR. PALMORE: Well, I think that,
11 Mr. Chief Justice that, I think there is a contrast
12 between 1333(b) and 1333(c) in terms of the specificity
13 with which Congress provided for where a particular
14 event would happen. There is no question that 1333(b)
15 has a situs requirement, but it is a situs of operations
16 requirement.

17 So when you are talking about a situs of
18 operations, you are talking about a geographic zone
19 where operations take place, it makes sense that
20 Congress would have used this phrase "on the outer
21 continental shelf." Now, the outer continental shelf
22 itself is a defined term in the statutes. In 1335(a) it
23 applies only to the subsoil and seabed. It doesn't
24 include artificial installations put on top. So we are
25 talking about a general zone, a general geographic zone

1 where the operations take place, and then Congress
2 wanted to provide benefits for injuries that result from
3 those operations.

4 JUSTICE ALITO: Suppose the facts of this
5 case were changed a little bit so that the Respondent,
6 instead of spending 98 percent of his time on an oil rig
7 doing things that he did there, actually spent only 20
8 percent of his time there and he spent 80 percent of his
9 time on land doing what he was supposed to be doing at
10 the time of the accident. This particular operation
11 produced so much scrap metal he had to spend 80 percent
12 of his time going around with a forklift gathering it
13 up. Now, would this case come out the same way then?

14 MR. PALMORE: We don't think so, Your Honor.

15 JUSTICE ALITO: Then how does that -- I
16 don't see how you get this result out of the statutory
17 language, because the causal connection between the
18 operations on the shelf and the accident are precisely
19 the same in the two situations. Whether he spends 98
20 percent of his time on the rig or 2 percent of his time
21 on the rig, it makes no difference whatsoever in the
22 causal relationship.

23 MR. PALMORE: Because we think it's a
24 mistake in the context of a workers' compensation scheme
25 to look at this as kind of a snapshot in time. We think

1 that when you are talking about a workers' compensation
2 scheme, the kind of causation that is relevant is the
3 causation caused by the employment relationship itself.
4 So if someone's spending, like Mr. Valladolid, is
5 spending 98 percent of his time on the shelf, he is he's
6 uniquely exposed to the hazards of work in that
7 dangerous environment.

8 JUSTICE SCALIA: The trouble with that is
9 it's not what it says. It says "as a result of
10 operations."

11 MR. PALMORE: And we think that --

12 JUSTICE SCALIA: I don't -- you know, I
13 would think he doesn't even have to be an employee, does
14 he?

15 MR. PALMORE: He does have to be an
16 employee. That's a -- only employees are entitled to
17 benefits. But I think the definition of "employee" or
18 really the related definition of "employer" is
19 instructive on this question. If you look at the
20 definition of "employer" in 1333(b)(2), this is on page
21 3a of the government appendix, the term "employer" means
22 "an employer any of whose employees are employed in such
23 operations." It's somewhat of a circular definition,
24 But there's a focus here on employees who are engaged in
25 such operations. Those are employees like Mr. --

1 JUSTICE KAGAN: Mr. Palmore, you are asking
2 us to look at the relationship between the employment
3 and the shelf activities, and the statute asks us to
4 look at the relationship between the injury and the
5 shelf activities. And those may be two different things
6 and seemingly are two different things in the
7 hypothetical that Justice Alito gave you.

8 MR. PALMORE: And the Ninth Circuit viewed
9 -- viewed injury in the way that Your Honor and Justice
10 Alito are suggesting. And I would -- and that is our
11 back-up position. I think both sides here have back-up
12 positions. I would submit that the back-up positions
13 are where -- -

14 JUSTICE KAGAN: The back-up positions may be
15 better than the primary positions in this case, you
16 know?

17 MR. PALMORE: I think the back-up positions
18 really also differ with each other only in a matter of
19 degree, not --

20 JUSTICE SCALIA: What is the back-up
21 position that is so much better here? What is it?

22 MR. PALMORE: Well, I don't -- to be clear,
23 we don't think it's better. We think that the category
24 of off-shelf injuries that should be covered are those
25 that are suffered by workers who spend a substantial

1 amount of time on the shelf. The back-up position is
2 the, in our view, is the Ninth Circuit position, which
3 is the substantial connection between the injury and
4 operations on the shelf. It doesn't strike me as that
5 different from Mr. Clement's back-up position.

6 JUSTICE ALITO: Well, the trouble is that I
7 have no idea what that means. Now, they have the
8 example of an accountant on land who spends all of his
9 time doing accounting work for the -- for the oil rig.
10 Why isn't there a substantial connection there? Were it
11 not for the operations on the oil rig, this guy would be
12 out of work or he would be doing something completely
13 different. I don't understand that.

14 MR. PALMORE: Well, that's the -- that would
15 be an expansive but-for test of the kind that at least
16 some language in the Third Circuit's opinion in Curtis
17 would support. We think that that sweeps too broadly.
18 We think a proximate cause, however, sweeps too
19 narrowly, and Justice Scalia's exchange with Mr. Clement
20 highlighted this. Proximate cause is a --

21 JUSTICE SOTOMAYOR: So substantial nexus is
22 just right?

23 MR. PALMORE: We think substantial,
24 substantial nexus, substantial connection. We think,
25 though, that it would be a mistake to look at only the

1 snapshot in time. There is some language in the Ninth
2 Circuit decision which -- which might suggest that. We
3 think --

4 JUSTICE SOTOMAYOR: Do you accept your
5 adversary's position that whatever causal -- you have
6 to, given your status test. Where are you drawing your
7 status test from? Meaning, obviously it's not from the
8 language.

9 MR. PALMORE: Well, I think I would submit
10 that it is from the language, Justice Sotomayor, because
11 we think that the language has to be understood in the
12 context of workers' compensation. This is not a
13 tort-based fault regime. This is a workers'
14 compensation scheme. Workers' compensation schemes are
15 based on the relationship between employer and employee,
16 and they cover injuries that arise out of and in the
17 course of employment. So the kind of causation that
18 matters in a workers' compensation scheme is the
19 causation that flows from the worker relationship
20 itself, the workplace relationship itself.

21 JUSTICE SOTOMAYOR: You're not -- I would
22 have just thought you would have taken it out of (b)
23 subdivision (2), the term "employer," almost the
24 obverse, means an employer -- means an employer any of
25 whose employees are employed in such operations.

1 MR. PALMORE: Thank you, Justice Sotomayor.
2 I think that is the second point. I think that textual
3 provision provides support for the fact that Congress
4 was particularly focused on those employees who were
5 uniquely exposed to the hazards of work on the shelf.

6 CHIEF JUSTICE ROBERTS: What if -- But what
7 if that exposure is not pertinent to what they are
8 doing? Let's take the individual, 98 percent of the
9 time on the rig and 2 percent on land, and an emergency
10 comes up and they need a new part and they say: Here,
11 go -- you know, go drive to Reno where they have a new
12 part and bring it back. And he skids off the road and
13 is injured. Is he really covered by the Offshore Act?

14 MR. PALMORE: We think he is because that is
15 a worker who is uniquely exposed to those hazards
16 offshore and he shouldn't --

17 CHIEF JUSTICE ROBERTS: Well, so he is -- he
18 is injured by a hazard on the road to Reno. He's -- I
19 don't know how many miles that is from the offshore, and
20 yet he's still covered by the Offshore Act?

21 MR. PALMORE: Yes, Your Honor, because we
22 think that -- and here the contrast with the underlying
23 Longshore Act is important and Justice Kennedy's
24 questions of Justice -- of Mr. Clement highlighted this.
25 It's quite an unusual thing for a workers' compensation

1 statute to have a situs-of-injury requirement. The
2 Longshore Act is the sole example of which I'm aware,
3 and it has it for historical reasons based on this
4 Court's decision in Jensen.

5 And it has a provision that is quoted on
6 page 19 of the government brief, that provides coverage
7 for disability or death, but only if the disability or
8 death results from an injury occurring upon the
9 navigable waters. That was clearly in front of Congress
10 at the time that it adopted OCSLA, because it was
11 incorporating that statute and applying it in the outer
12 continental shelf context. And it's quite telling that
13 Congress did not use that but-only-if formulation.

14 JUSTICE SCALIA: Yes, but Mr. Clement says
15 that -- and we can argue about whether the language does
16 it or not, but the system he comes up with he says
17 creates a very sensible division. You're either under
18 the Longshore Act or you're under this act. And whereas
19 in your situation, you can be under both, can't you?

20 MR. PALMORE: Yes, in some situations.

21 JUSTICE SCALIA: Well, why does that make
22 any sense?

23 MR. PALMORE: Because the kind of certainty
24 -- We think our test is actually much easier to
25 administer and provides greater predictability in this

1 sense.

2 JUSTICE SCALIA: Which one prevails when
3 they both apply? Are there any differences between the
4 two?

5 MR. PALMORE: Well, there's -- Congress
6 contemplated, expressly contemplated, that there would
7 be overlapping coverage and adopted a provision in
8 903(e) of the Longshore Act to provide for offsetting
9 payments when there is overlap. Overlap is a fact of
10 life in this area.

11 JUSTICE BREYER: I think the question is, is
12 there any difference between the two.

13 MR. PALMORE: Well, in this case the Federal
14 benefits were more generous than the State benefits.

15 JUSTICE BREYER: Well, why wouldn't they
16 have been -- I mean, as I understand it, if a person of
17 a certain set -- it's the same set in both, virtually,
18 the same set of people -- where they are injured on
19 navigable waters or piers and docks and so forth, it's
20 the Longshore Act. And if you are on the platform, it's
21 this act, so far. And the benefits are the same.

22 MR. PALMORE: Correct.

23 JUSTICE BREYER: Okay. So the only thing
24 that extending this does, I think he says, is imagine a
25 person who worked on a platform goes to get some

1 platform bits repaired miles from the sea. Now, that
2 person would not be covered by Longshore Act, would he?

3 MR. PALMORE: Would not.

4 JUSTICE BREYER: No. And he would be
5 covered by this if they're right, but not if Clement is
6 right.

7 MR. PALMORE: Correct.

8 JUSTICE BREYER: Okay. So he's saying what
9 point was there for Congress to do that?

10 MR. PALMORE: Because we thought that
11 Congress intended this to function in the way that other
12 workers' compensation schemes function, both at the time
13 that OCSLA was adopted and today, which is that the
14 coverage provides comprehensive benefits from the start
15 of the work day to the end of the work day.

16 JUSTICE BREYER: Let me give you an example.
17 It might help. A longshoreman is working on a dock.
18 Someone tells him: There is a winch here that is
19 broken; take it to the plant to have it repaired, which
20 is 100 miles inland. He does it, and he's hurt at the
21 plant. He is not covered, correct.

22 MR. PALMORE: Under the Longshore Act,
23 correct.

24 JUSTICE BREYER: Yes, that's right. So he's
25 not covered.

1 MR. PALMORE: Correct.

2 JUSTICE BREYER: But if the same thing
3 happens on the platform, under your theory he is
4 covered. Now, your opponent is asking a reasonable
5 question. That seems to be about the only difference
6 that he can think of, whether it's the one act or the
7 other, and why would Congress have done that? That's
8 his question, and I would like to hear the answer.

9 MR. PALMORE: Because in that situation,
10 Justice Breyer, the Longshore Act's strict
11 situs-of-injury requirement is the exception, not the
12 rule. That is unusual and really unprecedented in
13 imposing a situs-of-injury requirement in the context of
14 a workers' compensation scheme. At the time of OCSLA --
15 at the time OCSLA was adopted in 1953, States had nearly
16 uniformly moved away from the tort theory of workers'
17 compensation coverage that would apply benefits --

18 JUSTICE BREYER: Your answer is basically
19 there are many statutes like this, they all have some
20 kind of OCSLA type requirement, it's the Longshore Act
21 that was rather stingy, and we don't know why.

22 MR. PALMORE: No, we do know why.

23 JUSTICE BREYER: Why?

24 MR. PALMORE: It was stingy for historical
25 reasons --

1 JUSTICE BREYER: Because of the workmen's
2 compensation?

3 MR. PALMORE: It was based on this Court's
4 decision in Jensen, and there is a whole long and
5 tortured history there, and that explains why Congress
6 did that.

7 But when Congress took the unusual step of
8 imposing a situs-of-injury requirement in the context of
9 a workers' compensation scheme, it did so in express
10 terms with this "but only if" --

11 JUSTICE SOTOMAYOR: Would the worker who
12 went to the factory be covered by State workmen's comp?

13 MR. PALMORE: Yes, just like the worker on a
14 fixed platform on the outer Continental Shelf would also
15 be covered by State workers' comp. Private Respondent
16 cites the Bobbitt case from California that says
17 California workers' comp doesn't have a -- location
18 requirement --

19 CHIEF JUSTICE ROBERTS: I'm sorry; I don't
20 understand the answer. So he's covered by both?

21 MR. PALMORE: Yes.

22 CHIEF JUSTICE ROBERTS: Oh.

23 MR. PALMORE: Overlap -- a certain degree of
24 overlap is a fact of life in this area. Section 903(e)
25 accounts for that by allowing for offsetting payment, so

1 there is -- never going to be double recovery, and
2 903(e) really just endorsed the historical practice of
3 offsetting payments that was discussed by this Court in
4 the Calbeck case. So that there has always been some
5 degree of overlapping coverage.

6 At the time of -- OCSLA was adopted in 1953,
7 this Court in Davis had recognized that even under the
8 Longshore Act itself there was a twilight zone of
9 overlapping coverage.

10 JUSTICE SCALIA: When -- when you are
11 covered by both the Longshore Act and State workmens'
12 comp, can you provide under either one?

13 MR. PALMORE: You -- you might proceed under
14 either one if you are covered by either one, but what is
15 quite, Justice Scalia, is you can't collect --

16 JUSTICE SCALIA: You can't get over --

17 MR. PALMORE: -- under either one, or if you
18 do, you -- there are going to be contingent offsets.

19 JUSTICE SCALIA: But you think you could
20 proceed under the State law if you choose.

21 MR. PALMORE: Yes, Your Honor.

22 JUSTICE KENNEDY: Do we -- do the courts
23 give some deference to the director's position?

24 MR. PALMORE: May I answer, Mr. Chief
25 Justice?

1 CHIEF JUSTICE ROBERTS: Please.

2 MR. PALMORE: Yes. In this Court's decision
3 in Rambo, the Court said that the director's
4 interpretation of the statute is entitled to Skidmore
5 deference.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Mr. Frederick.

8 ORAL ARGUMENT OF DAVID C. FREDERICK
9 ON BEHALF OF THE PRIVATE RESPONDENT

10 MR. FREDERICK: Thank you,
11 Mr. Chief Justice, and may it please the Court:

12 I would like to shift some focus to what
13 would have happened if Mr. Valladolid had worked on a
14 floating platform instead of a fixed, because the law is
15 clear that if the platform was floating he would be a
16 Jones Act seaman, and under this Court's cases if he
17 were injured on land he would have a Jones Act remedy.
18 So the only anomaly here is that he happened to be
19 working on a fixed platform 98 percent of the time and
20 the question is whether the permissive workers'
21 compensation benefits provided under OCSLA carry with
22 him when he happens to be injured on land as a result of
23 the shelf operations.

24 JUSTICE SCALIA: I don't think that's an
25 anomaly. I mean, you know, if it's a floating platform

1 it's a vessel. It's the difference between a vessel and
2 a dock. Is it an anomaly that you are -- you are
3 covered under the Longshore Act if you are injured on a
4 dock, which is fixed, but you are not -- you're covered
5 under the Jones Act instead if you are on a vessel,
6 which is not fixed?

7 MR. FREDERICK: Your question, Justice
8 Scalia --

9 JUSTICE SCALIA: That doesn't seem to me
10 like an anomaly at all.

11 MR. FREDERICK: Well, let me answer your
12 question this way, Justice Scalia.

13 JUSTICE SCALIA: How many floating platforms
14 are there, anyway?

15 MR. FREDERICK: There are a number of
16 floating platforms in the Gulf of Mexico. They're
17 operating on the outer continental shelf as well as on
18 the Western Pacific --

19 JUSTICE SCALIA: And they're covered by the
20 Jones Act?

21 MR. FREDERICK: Yes. That's correct.

22 JUSTICE SCALIA: They should be; they're
23 vessels.

24 MR. FREDERICK: But the point is that they
25 get a Jones Act remedy if they happen to be injured on

1 land. So, Mr. Chief Justice, under your hypothetical,
2 if the Jones Act seaman is driving to Reno and there is
3 an accident, he is covered under the Jones Act and gets
4 to have a Jones Act remedy notwithstanding that the
5 injury has nothing to do with his service on the vessel
6 itself.

7 JUSTICE SCALIA: You're -- you are not
8 proposing to eliminate that anomaly?

9 MR. FREDERICK: No, what I'm saying is that
10 the --

11 JUSTICE SCALIA: You are saying wherever you
12 are injured, so long as you are on a -- a platform you
13 are -- I don't think so.

14 MR. FREDERICK: If the work is substantially
15 related and the causal connection goes to the employment
16 relationship to the operations, the worker is covered
17 under OCSLA.

18 JUSTICE SCALIA: So you still have an
19 anomaly.

20 MR. FREDERICK: There is --

21 JUSTICE SCALIA: Sometimes it will be
22 covered; sometimes it won't be.

23 MR. FREDERICK: It is to be sure a more
24 comfortable fit to the actual language of the statute
25 than imposing and superimposing a situs-of-injury

1 requirement which is nowhere to be found in section
2 1333(a).

3 JUSTICE GINSBURG: Is there any injury on
4 land in the course of employment that would not be
5 covered by OCSLA where we have a worker of this kind who
6 spends 98 percent of his time on the Outer Continental
7 Shelf -- the injury, however, is on land? Is there any
8 case where such a worker who predominantly works on the
9 outer continental shelf would not be covered by OCSLA in
10 your view?

11 MR. FREDERICK: Well, if the work is arising
12 out of the course and scope of employment, which is the
13 natural way that these workers' compensation regimes
14 work, and it is related to the shelf operations, our
15 submission is yes, he is covered under OCSLA.

16 JUSTICE GINSBURG: So then what you are
17 really saying is -- it's not your test but maybe the
18 government saying we look to see, is this person
19 dominantly working on the outer continental shelf?

20 MR. FREDERICK: That -- that's correct,
21 Justice Ginsburg. It's the easiest-to-administer test,
22 too, because the way workers' compensation insurance
23 works, the employer will, based on the payroll of the
24 workers who are out on the shelf and its overall
25 payroll, will pay workers' compensation premiums and

1 under the Department of Labor regulations it will add an
2 endorsement for those workers whose status it controls,
3 would be covered under OCSLA and thereby get the higher
4 Federal benefit.

5 JUSTICE SCALIA: So if you work only 20
6 percent of your time for this -- this drilling company
7 on - on the -- on the platform but it so happens that
8 you are injured on the platform, you know, a bolt comes
9 off and strikes you, you are not covered?

10 MR. FREDERICK: Well, our submission would
11 be he would be covered because he's directly injured as
12 a result of the operations on the shelf. It's a
13 factor --

14 JUSTICE SCALIA: Well, then -- then you are
15 not applying the -- the employment test. I mean, you
16 either are or you are not.

17 MR. FREDERICK: Well, that person is going
18 to be covered under our submission because it's a
19 two-part inquiry. You look at the nature of the
20 relationship and you look at the nature of how the
21 injury came about, and under those circumstances we
22 agree with the government that if somebody is -- if an
23 employee is out on the platform and is injured as a
24 result of operations that person is covered.

25 JUSTICE SCALIA: Heads I win, tails you

1 lose, right? We -- we -- we have a situs-of-the-injury
2 test when you have less than your -- a majority of your
3 work on the platform, but we don't have a situs test
4 when the majority is on the platform.

5 MR. FREDERICK: I would suggest that the
6 incongruity --

7 JUSTICE SCALIA: How do you get that out of
8 this statute?

9 MR. FREDERICK: It's even greater under
10 their hypothetical with the helicopter worker, because
11 they want to get the person who's riding in the
12 helicopter out to the shelf covered under the Longshore
13 Act, but that flies directly in the face of this Court's
14 holding in Herb's Welding that when he is on the fixed
15 platform, he doesn't get longshore benefits. And so
16 here under their hypothetical --

17 JUSTICE SCALIA: Was it the Longshore Act?
18 I -- I thought -- I thought it was the Jones Act that
19 they were covered in the helicopter.

20 MR. FREDERICK: No. Under his submission,
21 his submission is that when they fly out on a helicopter
22 and they crash in the water they get longshore benefits.
23 But if they actually made it to the platform under this
24 Court's holding in Herb's Welding they would not get
25 longshore benefits.

1 CHIEF JUSTICE ROBERTS: Well, I mean, both
2 positions --

3 MR. FREDERICK: If they were in State
4 territorial waters.

5 CHIEF JUSTICE ROBERTS: Both positions, Mr.
6 Frederick, are vulnerable to particular hypotheticals.
7 You have imprecision as to what it means to spend most
8 of your time on the -- on the shelf, and they have their
9 own problems. What do you do with somebody who's -- 3
10 months he's on the shelf, and then 3 months he's back --
11 back on land 3 months? Does it depend when the injury
12 occurs, whether it's when he's on the land part of his
13 job or on the shelf part?

14 MR. FREDERICK: The way this Court handled
15 that under in seaman context under Chandris was to look
16 at the totality of the circumstances of the worker's
17 employment, and that seems to be --

18 CHIEF JUSTICE ROBERTS: I have given you all
19 the totality. He is working 3 months, and then he's --
20 you know, it's seasonal or something, and 3 months he is
21 on -- on the land. That is the totality of the
22 circumstances.

23 MR. FREDERICK: He would be covered.

24 CHIEF JUSTICE ROBERTS: Why?

25 MR. FREDERICK: Because he's the kind of

1 person that Congress would want to provide coverage to
2 under Federal worker -- mind -- remember, in --

3 CHIEF JUSTICE ROBERTS: How do you know it's
4 the kind of person? I thought your line was whether or
5 not he spends most of his time on the shelf or most of
6 his time somewhere else.

7 MR. FREDERICK: That is actually substantial
8 work. We don't disagree with the government's adoption
9 of a Chandris 30 percent line. That seems appropriate
10 in light of the fact that many of these workers come on
11 for two weeks and off for two weeks. They are working
12 12-hour shifts while they are out on the rig. It seems
13 appropriate that the coverage should go with them when
14 they are --

15 CHIEF JUSTICE ROBERTS: 30 percent is the
16 line.

17 MR. FREDERICK: That's what the -- the
18 government -- I have no brief to defend,
19 Mr. Chief Justice, in terms of where that line is,
20 because my client's husband --

21 CHIEF JUSTICE ROBERTS: I know, but we would
22 like to have a test that we apply to your situation, and
23 it's nice to know, you know, maybe 30 percent I guess is
24 as good as any.

25 MR. FREDERICK: The point that Congress is

1 trying to get at -- and these are platforms that were
2 covered by State workers' compensation in 1953 -- was to
3 extend the more generous Federal benefits to encourage
4 an industry that was a nascent industry to develop the
5 resources of the outer continental shelf, to provide
6 uniformity, to provide benefits to the workers who were
7 exposed to the perils that were out on the platform, so
8 it makes sense, we submit, that when those workers who
9 are subjected to those circumstances have the same
10 Federal benefits. And they are substantial benefits.

11 My client, for instance, got a one-time lump
12 sum payment of \$42,000 for the death of her husband, as
13 opposed to the Federal benefits that would be
14 approximately \$466 per week during the remainder of her
15 period as a widow, and the State benefits would be
16 credited against any Federal benefits that she would be
17 getting in the future. But it's -- it is a substantial
18 dimension to the life of a worker out on the shelf.

19 JUSTICE KAGAN: Suppose, Mr. Frederick, that
20 we find that we can't find your status test in the
21 language of the statute, and then what this statute
22 seems to give us is instead a causal test, and that the
23 cause is whether operations on the outer continental
24 shelf caused the injury in question. So what's your
25 best argument for how operations on the shelf caused the

1 injury in this case?

2 MR. FREDERICK: The scrap metal that Mr.
3 Valladolid was charged with moving at the time of his
4 the death was very likely the same scrap metal that he
5 personally had taken off the shelf, or someone in his
6 position would have taken off the shelf. And to Justice
7 Kennedy's point, the equipment is heavy, dangerous,
8 difficult equipment. Just the fact that it is moved off
9 the shelf for a cleaning -- scrap, for removal, et
10 cetera, is an immaterial difference.

11 In their reply brief, they concede that an
12 oil spill worker who's cleaning up the oil spill from an
13 offshore event is going to be covered under a -- what
14 they call a proximate cause standard -- under any kind
15 of substantial connection proximate cause. Proximate
16 cause is a legal policy that determines how you want to
17 limit the scope of the injuries that would be covered.

18 In a workers' compensation scheme,
19 Justice Scalia, you are completely right it makes no
20 sense. And so if you adopt some kind of substantial
21 connection, it has to be very loosely related. As the
22 Court in the FELA context last term held in CSX v.
23 McBride, where you have a negligence standard, it makes
24 even more sense to have a very relaxed standard of
25 causation under workers' compensation.

1 JUSTICE SCALIA: I -- if -- I assume that
2 the Act would also apply under your analysis to a -- an
3 independent contractor, a trucker, who carries this
4 heavy -- heavy steel to the place where this worker
5 worked on it, right?

6 MR. FREDERICK: I don't think so.

7 JUSTICE SCALIA: Well --

8 MR. FREDERICK: You have to be an employee.

9 JUSTICE SCALIA: He would not be carrying
10 the steel had it not been for the -- for the operations
11 on the shelf.

12 MR. FREDERICK: It has to be an employee.
13 If -- if -- your hypothetical is the independent
14 contractor on land, it has to be an employee in order to
15 be covered. And that person doesn't qualify, which
16 creates another set of difficult lines to draw under the
17 Longshore Act, where you also have to be an employee,
18 and independent contractors are not covered.

19 JUSTICE SCALIA: He would be covered if --
20 if -- he were employed by the -- by the firm that
21 operates the platform, right?

22 MR. FREDERICK: If you could give me the
23 rest of the facts of your hypothetical, Justice Scalia.

24 JUSTICE SCALIA: Well -- it's just the guy
25 that drives the truck that takes the steel to the place

1 where your client worked on it.

2 MR. FREDERICK: Not covered, because that
3 person is not directly substantially working on shelf
4 operations --

5 CHIEF JUSTICE ROBERTS: Unless he spent 30
6 percent of his time on the shelf. Then he's covered.

7 MR. FREDERICK: Yes. Because those workers,
8 those workers -- I think it's hard to imagine the kinds
9 of --

10 JUSTICE KENNEDY: The 30 percent over the
11 time of his career, or that month or in a year?

12 MR. FREDERICK: This Court's articulation of
13 that standard, Justice Kennedy, in the Chandris test has
14 been the subject of litigation in the lower courts, and
15 my understanding is that the courts have kind of worked
16 out the various factors and standards that go into the
17 nature of the employment standard --

18 JUSTICE GINSBURG: You -- you are talking
19 about the Chandris standard that that -- the seaman's
20 relationship to the vessel must be substantial in nature
21 and duration --

22 MR. FREDERICK: Correct.

23 JUSTICE GINSBURG: And that's a kind of a
24 vague -- what is substantial is the problem we have
25 here? What is that --

1 MR. FREDERICK: That's correct. And the
2 nature -- you know, if I could -- I'm sorry, did you
3 want --

4 JUSTICE GINSBURG: Yes, so how have courts
5 worked this out? What is a substantial relation to the
6 vessel?

7 MR. FREDERICK: As I understand the case
8 law, Justice Ginsburg, there are a range of factors that
9 go into the nature of the sea workers' relationship to
10 the vessel, and they go to -- they go to duration, they
11 go to the performance of duties in the completion of the
12 mission of the vessel and the like. And there are a
13 range of standards. Obviously, the facts of each crew
14 member is difficult to unpack in a hypothetical at this
15 time.

16 CHIEF JUSTICE ROBERTS: Obviously, it's a
17 real mishmash, and maybe that's what we are -- we are
18 stuck with. How does this work as a practical matter?
19 I'm assuming the companies get insurance to cover their
20 risks here.

21 MR. FREDERICK: Correct.

22 CHIEF JUSTICE ROBERTS: Who decides -- maybe
23 the insurance company will underwrite how many people
24 spend what percentage of time where?

25 MR. FREDERICK: And as a practical matter,

1 Mr. Chief Justice -- and I don't represent the insurance
2 company here -- but the way I understand that it works
3 is that on an annual or on a periodic basis, the company
4 and the insurance company get together through some
5 auditing process where there is verification of the
6 workers who are OCSLA workers and thereby get the
7 longshore benefits, and the company and the insurance
8 company work that out to determine either numbers or
9 particular individuals or the like. And so here what we
10 are talking about is a situation where the employer is
11 not liable for the damage. It's an insured risk, and --

12 CHIEF JUSTICE ROBERTS: Wouldn't they have
13 to pay higher insurance rates -- to say they're not
14 liable for it I think is a real --

15 MR. FREDERICK: It's a different form of
16 liability and it's one that based on the way workers'
17 compensation is traditionally developed -- and I would
18 direct the Court to the opening chapters of Larson's
19 monumental treatise on workers' compensation, where he
20 basically says if this is a social compact in which the
21 employer doesn't have to face liability for personal
22 injuries in tort, but gets insurance and the premiums
23 are then passed on to the consuming public of that
24 particular entity's goods.

25 JUSTICE BREYER: Does it carry over who is

1 an employee from the Longshoreman Act, which defines an
2 employee as a maritime worker, and then defines that as
3 exceptions and so forth and this has a couple more.
4 That's who the employee is, right?

5 MR. FREDERICK: Under this statute, no,
6 (b)(2), as Justice Sotomayor referenced, it is -- it is
7 an employer, some of whose employees are engaged in
8 "such operations." And Mr. Valladolid was exactly the
9 kind of person who was engaged in such operations.

10 So our submission, Justice Breyer, is that
11 that is the kind of person that Congress contemplated
12 when it was focusing on the workforce that would be
13 engaged in the development of the outer continental
14 shelf.

15 CHIEF JUSTICE ROBERTS: But you -- I don't
16 mean to get back to -- it's not you have to say that
17 Congress contemplated the person who spent 30 percent of
18 his time on the outer continental shelf. In terms of us
19 coming up with a test. Maybe your client is an easy
20 case, where it's 98 percent. But the test you want us
21 to adopt covers the person who spends 70 percent of his
22 time on land?

23 MR. FREDERICK: Mr. Chief Justice, if I
24 could put it this way, the pushback for the but-for test
25 in its broadest sense is that there isn't a natural kind

1 of a way of confining some restriction to it. And so if
2 you look at the statute in terms of what it naturally
3 must have meant by Congress, there is a natural limit,
4 and it is not just complete but-for causation, but there
5 are an effort -- there is an effort to try to restrict
6 the scope of the compensation.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Clement, you have four minutes
9 remaining.

10 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

11 ON BEHALF OF THE PETITIONERS

12 MR. CLEMENT: Thank you, Mr. Chief Justice.

13 A few points in rebuttal. First of all,
14 Justice Kennedy, you asked about deference, and I think
15 before you give any deference to the government's
16 position you should look at the other government's
17 position which is to say the position that the
18 government took in its brief to this Court in *Picket v.*
19 *Petroleum Helicopters* in 2002.

20 They have a completely different position
21 now and they've never explained the difference other
22 than to say what they thought was plausible then they
23 now find persuasive now. That's not enough for
24 deference. And in that brief they took a position very
25 similar to ours. There has to be status plus situs

1 albeit a slightly different situs, but otherwise it's on
2 all fours with our position. Second of all, the
3 government comes up here and says the longshore remedy
4 is an outlier among workers' compensation remedies
5 because it's the only one with a situs.

6 Well, the problem with that is of all the
7 workers' compensation provisions that Congress could
8 have extended to the Outer Continental Shelf, it picked
9 the Longshore Act with the situs requirement. And the
10 government also says, well, you know, the reason that
11 the Longshore Act had a situs requirement was because of
12 Jensen, and this Court's decision in Jensen created a
13 problem about whether State workers' comp law could go
14 to navigable waters.

15 Well, that's the same back drop against
16 which Congress is passing OCSLA. It doesn't know that
17 State workers' compensation law can go to the Outer
18 Continental Shelf. Jensen is still good law. Jensen
19 tells Congress that it can't extend -- they can't extend
20 their laws to the navigable waters. What makes --

21 JUSTICE GINSBURG: Why doesn't Congress
22 know? Because I think states overwhelmingly would
23 include Outer Continental Shelf workers in their
24 compensation scheme.

25 MR. CLEMENT: Oh, no, Justice Ginsburg.

1 What states overwhelming did is say a worker could be
2 covered in a different state. But covering them on the
3 Outer Continental Shelf was not something that was well
4 established.

5 And indeed Congress specifically heard
6 testimony that questioned the ability of either states
7 to get their workers' comp law there directly and also
8 heard that there might be constitutional problems
9 because of the Knickerbocker Ice case of Congress
10 extending the State law there. So that's why they
11 settled on this remedy of taking this Longshore Act that
12 solved the Jensen problem on the navigable waters and
13 solved the same problem for the Outer Continental Shelf.

14 JUSTICE GINSBURG: It would make sense to
15 use the Longshore Act because they would have the same
16 level of compensation.

17 MR. CLEMENT: As other alternatives like the
18 Jones Act?

19 JUSTICE GINSBURG: No. They wanted the
20 OCSLA worker to have the same benefits as the longshore
21 worker.

22 MR. CLEMENT: Sure, when they were on the
23 shelf. But they were solving the exact same kind of
24 jurisdictional problem they saw with the Longshore Act
25 with the shelf -- with the statute. Justice Sotomayor,

1 I don't think you can read too much into B(2). All b(2)
2 is doing is modifying the same definition for the
3 longshores. You are an employer if you employ a
4 longshoreman or a longshore worker. So they are just
5 updating this for purposes of extending a longshore
6 remedy to the shelf. B(3) does the same thing. And it
7 modifies the situs and creates a situs that makes sense
8 for the shelf: the navigable waters, drydocks, the
9 shelf, artificial islands and everything attached
10 thereto.

11 Mr. Chief Justice, you talked about the
12 imprecision of their test. It's worse than that. It's
13 imprecision without any text. At least in the Jones Act
14 you have seamen and you have some other textual clues as
15 to where you draw these limits. Here there is nothing
16 in the statute that in any way suggests a status-based
17 test. So you would be completely unmoored, if you will.

18 The last point I would make is this. The
19 answer to the causation test is really of the kind of a
20 lie of the other side's position is what they say when
21 they are dealing with somebody who is not a 98 per
22 center but is a 2 per center. When that person goes out
23 on the shelf, when are they covered? Well, when the
24 injuries operating on the shelf cause a direct injury on
25 the shelf. At that point even the government resorts to

1 a situs-based test.

2 Well, here's the problem. That status-based
3 test, it is in the Jones Act; it's not in OCSLA. And
4 even when you recognize that and you look at what is
5 left of the case, what is left of the case is either our
6 approach that essentially incorporates the Longshore Act
7 through b(3) or a tight-nexus test that would require a
8 geographical focus and give -- give force to the words
9 "conducted on the shelf."

10 This person was injured by operations for
11 the purpose of exploring the shelf at some level, but he
12 sure wasn't injured by operations conducted on the shelf
13 for those purposes. He was injured by operations on dry
14 land. And under those circumstances, the remedy lies
15 with the State workers' comps law, not with OCSLA.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 The case is submitted.

18 (Whereupon, at 11:04 a.m. the case in the
19 above-entitled matter was submitted.)

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